TAB 99

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UNITED STATES OF AMERICA, ex rel,

VEN-A-CARE, FLORIDA KEYS, INC.,

Plaintiffs,

Case No. 07-10248

-against-

BOEHRINGER INGELHEIM CORPORATION,

et al.,

Defendants.

--x

May 20, 2009

8:03 a.m.

CONFIDENTIAL

Continued deposition of JONATHAN R. MACEY, taken at the offices of Kirkland & Ellis, Citigroup Center, 153 East 53rd Street, New York, New York, before Georgette K. Betts, a Certified Shorthand Reporter, Registered Professional Reporter and Notary Public within and for the States of New York and New Jersey.

268

Roxane. Not so much coordinate in the sense of do things together, but get, you know, synergistic benefits from working with each other, seeing how the other people work. So they are getting people performing the same functions in the same place I think -- so they could be monitored more easily, so they would be evaluated better.

Q. Do you know whether Ms. Waterer and Ms. Paoletti's job responsibilities changed in any way following the January 1st, 2002 move to Cleveland?

A. Well, my recollection -- and this is why I characterized this not -- you know, these people are moving location but they continue -- my understanding is they continued to work for Roxane during this time while they were physically at the Ben Venue corporate campus.

Q. So you're not aware that their job responsibilities changed when they moved from one campus to the other campus?

A. I don't recall that -- I assume that there were some changes just because that would be natural, but my understanding is that they

269

retained responsibility for -- they continued to do the same functions with respect to Roxane that they previously had done.

It certainly would make sense in terms of business justification for the move if there were some, you know, change and expansion of their roles to provide even a better, you know, efficiency justification for the move. I just don't recall offhand seeing that their responsibilities expanded when they moved to Cleveland.

Q. Thank you.

In forming an opinion as to whether a person acted as an agent of Roxane, did you consider whether or not Roxane paid the employee's salary as a factor?

A. I certainly took that into account, but I had to weigh it against a few things. Number one, just in general there's no requirement for someone to act in an agency capacity that they actually receive compensation. In fact, quite the opposite. Number two, the overwhelming business

270

practice in the United States is to have people receive a single paycheck. And in the particular context of these facts, it's my understanding that the companies involved, BIPI, RLI, Ben Venue, and BIC, actually had different pension plans such that it would have been very difficult to take an employee, say Mrs. Waterer, whoever, and say, well, you're going to be 80 percent allocated to Roxane and 20 percent allocated to Ben Venue and you'll have -- 20 percent of your pension will be here. It would create a truly human resources administrative nightmare.

So it is my -- it is absolutely the case that while people wear many hats in corporations, it is -- I'm not aware of very many, if any, situations where a company would, while having somebody wear two hats go to the sort of, kind of extreme bureaucratic step of making some attempt to, you know, give -- pay them two different paychecks, et cetera.

So I think, you know, starting with the premise that people can work for more than one

271

entity, if they work for more than one entity they either have to be paid by one or both. And it's just inefficient to be paid by both and we don't observe that in the way business is conducted.

Q. Are you aware whether any employees were paid by multiple entities within the Boehringer Ingelheim family?

A. I looked for that and didn't find a single case, even with respect to Mr. Gerstenberg where there were -- people were getting multiple paychecks, I looked for that and I did not see it.

Q. Where did you look to see who paid Mr. Gerstenberg's salary?

A. I looked -- there were a number of -- in a lot of these depositions I think you actually, you were asking the question where do people's paychecks come from, so I was looking for that question. I thought it was a good question and I was looking for it with respect to, you know, to see were what the -- you know, what the answers were because I would have been interested if somebody -- I think we had different approaches,

272

obviously. My approach would have been I would have been shocked to see somebody getting, you know, one-third of their pay from this entity, one-third of their pay from that entity, one-third of the pay from another entity. So I was looking for those sources.

Q. Did you consider any interests of fairness or equity in forming your opinion that Roxane's corporate veil should -- well, in forming your opinions in this case?

A. Certainly, yes.

Q. What about interests of the public convenience or welfare?

A. Yes.

Q. Are these concepts relevant to the analysis of whether a court should pierce a corporation's veil?

A. Often they are.

Q. How so?

A. Now just to be clear, in that particular question, just to make my answers as clear as I can, I testified yesterday that at the level of

273

abstraction at which I'm talking there really isn't a difference in the policies and rules of disregarding the corporate form from state to state.

Now you're asking me a more specific question having to do with should fairness be taken into account. And that -- with respect to that more specific question, I will represent to you in answering your question that this is an area in which there are differences. That is to say, some states require an element of unfairness, most do, as a condition for disregarding the corporate form. Although there are a few states where that requirement is not in place.

I do think that the trend is decidedly in favor of imposing this -- these requirements that you're describing.

Q. How do these concepts enter the analysis?

A. Well --

MS. RIVERA: Can I just object? I just want to object. You're asking him -- he testified

274

yesterday he's not giving opinions on the law and what the rules are for piercing the corporate veil. So are you asking him this outside the context of the expert opinions he's here to testify to in this case?

MR. FAUCI: I'm going to ask Professor Macey, you can just object to the record and if Professor Macey wants clarification he'll ask for it, I assume.

MS. RIVERA: Well, I object.

MR. FAUCI: That's fine.

Q. The question, Professor Macey, is:

How do concepts of fairness and the public welfare enter into the analysis of whether or not a corporation's veil should be pierced?

A. Okay. Well, as I stated in my report, there are strong efficiency reasons for limited liability. In fact, most economists do not believe that it is possible to have a developed economy that has reasonable levels of income for people unless people are able to organize businesses in the corporate form, and that means

275

limited liability.

So that means we have to -- we raise the question under what circumstances should we ignore the corporate form and notwithstanding the proper, you know, incorporation of a firm, we would disregard the corporate form. And as we -- as I talked about in chapter two -- I'm sorry, paragraph two of my report, I'd say the -- piercing the corporate veil should only be done in rare and unusual circumstances. Generally the way this is organized is a matter of implementing policy is to say, well, we need a whole lot of bad stuff. Like we need, you know, disregarding corporate form, we need under capitalization, we need fraud, we need all sorts of, you know, these kind of various factor tests. And then the courts say even where we have that, we will still not disregard the corporate form unless the problems that the various factors that might otherwise go into a decision to disregard the corporate form are combined with elements of unjustness or elements of unfairness.

296

capitalization is one indication, not the only but one indication of the capacity of a firm to operate sort of under its own steam, if you will.
Q. You formed an opinion in this case that Roxane was sufficiently capitalized, correct?
A. Yes, that's correct.
Q. Did you evaluate Roxane's capitalization at the time of its incorporation?
A. Well, I didn't look -- I didn't find any specific balance sheets relating to the initial capitalization. I did look into the history of Roxane and -- let me see if I can refresh my recollection.
So the firm was formed in 1885 as a company called Columbus Pharmacal. I had no financial information from that date, although I do know as a matter of my historical research and expertise that in 1885 there was -- it would have been impossible legally to form a corporation without adequate capitalization.
Then we have the purchase of the company in 1959 when the firm's name was changed to

297

Phillips Roxane and then the acquisitions by Boehringer Ingelheim in '78 that the corporate history that I reviewed was consistent with the firm being well capitalized when it was formed and well capitalized up until at least, obviously, the time at which the analysis in my report begins.
Q. Did you also evaluate Roxane's level of capitalization over time?
A. Yes.
Q. What steps did you take to evaluate whether Roxane's level of capitalization was sufficient?
A. I'm sorry.
Q. What steps did you take to evaluate whether Roxane's level of capitalization was sufficient?
A. Essentially what I did was to examine the company's balance sheets and profit and loss statements to determine whether or not the company had been -- had adequate levels of capitalization and had resources to pay its debts as they came due in the ordinary course of business.

298

Q. Was the first step actually measuring Roxane's level of capitalization?
A. Yes.
Q. And what documents did you consider in doing that?
I believe you said balance sheets and profits and loss sheets. Was there any types of documents you looked at in measuring Roxane's capitalization?
A. I certainly looked at Jim McIntyre's deposition testimony because he was an accountant and a financial -- who had kind of lived with the financial condition of Roxane to see if he had anything to say. It was sort of inconsistent with what I was saying.
I'm trying -- there may have been other documents that I looked at, but those were my sort of most important touchstones.
Q. Are you an accountant?
A. I'm not a CPA, no.
Q. Do you consider yourself to have expertise in accounting?

299

A. Yes. I have been qualified as a member of the board of a public company as someone who is knowledgeable about accounting. I'm not an accounting expert.
Q. Which company is that?
A. This is WCI Communities, where I serve on the audit committee.
Q. What are your responsibilities there?
A. Well, I'm on the corporate governance committee and the audit committee. My responsibilities include hiring and firing the company's auditors, reviewing the company's financial statements, reviewing press releases related to financial information, making sure that the -- having general oversight responsibility for ensuring that the financial statements of the company are presented fully and fairly and in accordance with the appropriate accounting principles.
Q. You said you were qualified -- they qualified you as --
A. Correct.

A. **Okay.**
Q. I'm looking at the paragraph under the subheading "A, Core Characteristics of Banking."
A. **Right.**
Q. There you write, the third sentence, "On average well-capitalized banks have debt-equity ratios of 10:1 as opposed to the 1:1 debt-equity ratios typical of nonfinancial firms."
Do you see that?
A. **Yes.**
Q. As you sit here today, do you agree that a 1-to-1 debt-equity ratio is typical of nonfinancial firms?
A. **This is -- the context here is these are nonfinancial firms that compete with banks like mutual funds, but yes.**
Actually rephrase that. At the time this was I think more or less correct certainly for looking now these numbers are vastly different or were that debt-equity ratios of banks is now 30 or 40-to-1. And debt-equity ratios of the nonfinancial firms I'm talking about in this

context, which are nonfinancial firms that compete with banks, it would be probably more like the ten to 12-to-1.
Q. So just so I'm clear on this, when you refer to nonfinancial firms in this article, specifically in the paragraph we just were talking about, what types of firms are you referring to?
A. **So in the context of this article, what I'm talking about is the basic competition between banks and nonbank forms of business enterprise. If banks -- which are characterized by insured deposits and loans, then you have money market mutual funds which have a deposit-like feature because you can have, you know, write checks and use the ATM card. But they don't lend money, they take the money and put the money in money market instruments. And those money -- that, as I think I talked about in this article certainly in others, there is an exact match not only in the debt-equity ratio but there's also a -- you know, in the term structure of the assets and liabilities so that -- you know, because when --**

to kind of prevent themselves -- to prevent them from being susceptible to bank runs.
Q. I believe you testified that the benchmark -- I'm sorry, I don't recall we can either have the court reporter read it back or you can tell me again.
A. **Okay.**
Q. What is the benchmark in the pharmaceutical industry?
A. **Well, there's a range, of course, of firms but you would see ranges in the 5-to-1 to 10-to-1 range would not be unusual.**
Q. What is that standard based on?
What is your understanding of that standard based on?
A. **It's based on looking at pharmaceutical firms and looking -- and computing averages.**
Q. Have you done that?
A. **Have I personally done it?**
Q. Yes.
A. **No.**
Q. But you read where that's done

elsewhere?
A. **Correct.**
Q. Can you think of an article that -- off the top of your head that does that?
A. **Not off, no.**
Q. The ratio, the benchmark you cited, do you have an opinion as to whether that benchmark is larger as we sit here today than it would have been 1995?
A. **Oh. No. No.**
Q. No, you don't have an opinion?
A. **Correct. I will say -- I don't have a specific opinion. I will add, though, that these are fairly stable over time in general, although this may have been a hot time of higher volatility. I would add, to the extent that they vary, it's more likely that higher debt-equity ratio rather than lower would have been tolerated.**
Q. In the past?
A. **Well, in that period. Not in all of the past, but in 2005 versus, say, right now.**
Q. I'm sorry, 1995.

320

A. **In 1995, right.**
Q. Did you compare Roxane's level of capitalization to that of other pharmaceutical companies?
A. **Not specific other ones, no, just specific industry average.**
Q. And you did in forming your opinions in this case compare Roxane's capitalization to the industry average, the industry benchmark?
A. **Right.**
Q. And your understanding of the industry benchmark is based on your review of other literature in the field which has articulated that benchmark?
A. **Yes, that's my recollection of what the benchmark is.**
Q. And as you sit here today, there's no authority you could point me to for the benchmark, specific authority?
A. **Correct.**
Q. What is a debt-to-equity ratio?
A. **A debt-to-equity ratio is simply the**

321

ratio of the amount of debt that a company has to the amount of equity that it has.
So if we imagine a company with a hundred dollars in assets, $50 in debt, and $50 in equity, we reach the 50-dollar in equity figure because the hundred dollars in assets minus the $50 in liabilities equals $50 equity. Since the firm now has $50 in debt and $50 in equity, that firm's debt-to-equity ratio would be 1-to-1 by way of example.
Q. Is debt the same thing as liability?
A. **Well...**
Q. I can focus this for you a little if you want.
A. **Okay.**
Q. Why don't we go back to Exhibit 15, that statement of financial position.
A. **Okay.**
Q. Which is page 10 of Exhibit 15.
A. **Okay.**
Q. Can you calculate a debt-to-equity ratio based on this document?

322

A. **Let me see.**
Yes.
Q. How would you do that?
A. **I would take the total liabilities of 42 million 954 and compare it to the total shareholders' equity of 101298, and then I would fiddle with a fraction to get the lower -- get the lowest ratio. In other words, I would -- then I would try to just, you know, reduce the fraction by, you know, reducing the numerator and the common -- and numerator and the denominator by common amounts.**
Q. By that you mean just simplify the fraction.
A. **Right, thank you, simplify the fraction.**
So it would be 42 million 954 debt, 101 million 298 equity.
Q. In paragraph 62 of your report, the very last sentence, you write, "Roxane's debt-equity ratio was reasonable."
Do you see that?
A. **Not yet -- yes, I do.**

323

Q. Did you calculate Roxane's debt-to-equity ratio for various points in time?
A. **Yes.**
Q. What periods of time did you consider?
A. **Well, the period of time that I looked at here was 2002 -- let me just check but I think it was 2002 to 2005.**
1995 to 2005.
Q. Are there written notes that reflect your calculations?
A. **No.**
Q. How did you make the calculations?
A. **I just did them on a calculator.**
Q. And so for the 1995 time frame, the calculation that you did would have been essentially what we just walked through, comparing the liabilities to the equity and finding a fraction therefrom?
A. **Sitting here right now that's my -- wait let me -- yes, I believe that's correct.**
Q. You may have answered this without me fully even getting it, so I'll just ask it again.

332

different from a loan from a bank?
A. Well, it's -- to be as simple as I can, this is not maybe -- this may lose some subtlety, but I think it will make the point clear, a loan from a subsidiary -- and I'm not talking here now about Roxane, I'm talking about, generally speaking, loans from subsidiary is different from a loan from a bank for in much the same way that somebody who obtains a loan from one's uncle is different than obtainin a loan from a bank. That is, it could be worse. The uncle could be really mean and assiduously require all sorts of, you know, atrocious terms, et cetera. But it also is the case that it could be the uncle could be more understanding about late payments, will have greater degree of identification and empathy and if the person who's borrowed money from their uncle needs another loan, and goes to a bank and says, gee, I need a loan, they say, well, you have this other loan and they say -- that it's easier, it's more likely than in the case of the affiliate loan that the borrower can say I can get my uncle

333

or I can get my affiliate company to agree to subordinate, to give you priority in repayment. Whereas if it were a loan from a third party -- it likely will say forget it, I want to maintain my priority.
Q. If a lending affiliate is more forgiving in loan terms to a member of its same corporate group than it would be to a third party, is that a factor suggesting that the companies are not fully independent?
A. What's relevant in that standpoint is you want to see are the loans documented, is there a business reason. Generally speaking, in a -- so generally speaking, the answer is no because if I'm a subsidiary of a company, it often is for many reasons really bad for my business if a related subsidiary finds itself in financial distress. And so I have an extremely strong personal interest in -- to the extent -- up to a certain point, obviously you don't want to throw good money after bad but up to a certain point you want to do everything you can to make sure that

334

the affiliate, you know, is able to weather stormy times and continue on as a viable business because by definition, as I say in the report, the idea of having these corporate groups is there are synergies but among the various companies if one subsidiary fails or is unable to obtain capital or loans, et cetera, then, obviously, the other subsidiaries in the holding company or parent lose those -- no longer can avail themselves of those synergies.
MR. FAUCI: I think if we take a five minute break I can be done for the next break.
MS. RIVERA: Great.
(Recess.)
(Whereupon, Invoice from Professor Macey, was marked as Exhibit Macey 017 for identification, as of this date.)
BY MR. FAUCI:
Q. Welcome back, Professor Macey.
A. Thank you, Mr. Fauci.
Q. Just in the way of housekeeping, I would ask if you're able to find the article that we

335

were talking about that supports the benchmark we discussed for average debt-equity ratios?
A. Certainly.
Q. If Maria could send that to us, that would be great.
A. Okay.
Q. One more bit of housekeeping, let's just introduce -- it's already been premarked Exhibit 17. Which is the second invoice.
Is this --
MS. RIVERA: Can I get a copy, Jeff?
MR. FAUCI: Sure.
Q. Is this a true and accurate copy of the -- of your most up-to-date invoice in this litigation?
A. Yes.
Q. Quickly directing your attention to the actual invoice, seven entries down under work performed it says "legal capital calculations"?
A. Yes.
Q. Those -- I just want to understand what that involved. Can you just describe how you made

those calculations one more time.
A. **Certainly, of course.**
So this involved several things. In fact, I will say that having looked back myself at this particular item, I don't believe -- I believe that it may have taken me longer than two and a quarter hours, but it is what it is on the time sheet.
So this involved the following things:
One, I looked at every year in the -- in this time frame that I discussed previously with respect to capitalization. I looked at whether there had been any incursions on the initial capitalization of the firm, which is -- reflects on the balance sheet as the term paid-in capital. There is also another amount of capital called capital surplus, which is the amount that shareholders have paid in to the company above the amount of the stated capital amount. And then a third thing that I looked at was I looked at retained earnings.
So put it differently, from an

accounting or a legal capital point of view, capitalization point of view, a firm's capital can be divided into basically three categories; stated capital, capital surplus, and retained earnings. So I looked at all three of those what are known as capital accounts and then I -- you know, as we talked -- and then I did the things we talked about earlier, looked at debt-equity ratios, and dividend payment policy, and et cetera.
Q. Is capital surplus the same as additional paid-in capital?
A. **Yes.**
Q. When you looked at retained earnings, the actual calculations that you performed, were those measuring the liabilities that show up in the balance sheet against the assets in the balance sheet?
A. **Yes, I think that's -- I'm not quite sure if I understand the question, but I believe - - I certainly what I did involved that. I think there may have been other things that I did, but yes.**

Q. What other things?
MS. RIVERA: All the things he just said.
A. **The other things --**
Q. I can try and be more precise then.
What other actual calculations did you do?
A. **So I did the calculations described in paragraph 54, meaning I computed an average of the retained earnings of the company from 1995 to 2005. And I computed an average of the dividend payments between 1995 and 2005.**
Q. In calculating debt-equity ratios, you compared liabilities as reflected in balance sheets against assets -- against the equity as reflected in the balance sheet?
A. **Yes.**
Q. Why did you look -- what is the relevance of the fact that Roxane never intruded upon, for a lack of a better word, its initial paid-in capital and its additional paid-in capital?

A. **Well, there's a very conservative theory -- there are people who have taken the view that that amount -- and other people disagree with but there are people who take the view that those sums are considered to be the basic capitalization for the firm on which a firm should not encroach.**
I believe that to be the case for stated capital. It's generally not the case for additional paid-in capital, which is sometimes referred to as capital surplus. But to the extent that some people are of that view, then I take the view, you know, at least in looking at it, knowing that there are people who take that view, I wanted to see, you know, if somebody taking that perspective would be concerned. And the answer would be they would not be because Roxane never -- didn't encroach or diminish the amount of its initial paid-in capital or its capital surplus. It always stayed the same.
Q. In evaluating Roxane's capitalization in 2000, is looking at whether or not it encroached upon its initial paid-in capital and its

additional paid-in capital an important part of the inquiry as to whether or not it's well capitalized?

A. It is among the factors that I took into consideration. There are lots of factors, none of which is dispositive but I would certainly describe it as relevant.

Q. Are you aware whether or not Roxane grew in size as a corporation -- whether it was a bigger corporation in 2000 than it was in 1995?

A. Sitting here right now, I can't -- I don't recall.

Q. Why don't you go back to -- or maybe we can short change this -- is the quantity, is the amount of net sales that a corporation has at least a relevant barometer of the corporation's size?

A. Dollar volume of net sales?

Q. Yes.

A. Is there --

MS. RIVERA: Are you looking for this one?

THE WITNESS: Oh, it's right here.

A. That would certainly be -- with other factors such as the amount of sales is a useful statistic that for -- particularly for a company like this whose business is sales. It is partially sales. So it would be one -- something that would be relevant in thinking about the size of a company.

Q. What are Roxane's net sales in 1995 according to Exhibit 15?

A. Let me see.

1995 actual net sales are 188,765,000.

MR. FAUCI: I'm going to introduce Exhibit 18.

(Whereupon, Roxane Laboratories Unanimous Written Consent of Directors, Bates-stamped BOEH04600363 through 368, was marked as Exhibit Macey 018 for identification, as of this date.)

Q. This is another Roxane Laboratories Unanimous Written Consent of Directors that attaches the year-end closing for 2000, including

the balance sheet and profit and loss statement.

If you turn five pages in, you will see the net income for 2000. The statement of income for 2000 I mean.

A. Right.

Q. And the net sales there are $632 million?

A. Yes.

Q. Does that suggest to you that Roxane grew as a corporation in size from 1995 to 2000?

A. Yes. Well, it suggests certainly that sales grew, holding all else constant and it looks as though the company grew.

Q. Assuming Roxane grew -- strike that.

Given that Roxane's sales, net sales in 2000 were significantly higher than they were in 1995, does the fact that it never encroached on its capital stock and additional paid-in capital become less significant as the company grows in size?

A. I don't see why, no. Keep in mind that the calculations that I performed on Roxane's

financial numbers control for size in the sense that I'm dealing with ratios.

So if the debt-equity ratio is X, it could be the same X, say, 15-to-1 for two companies. One company could be -- could have only $15 in debt and $1 in equity. The other company could have $15 billion in debt and a billion dollars in equity. It would be the same debt-equity ratio.

And what keeps the debt-equity ratio relevant is that as the companies go up, its liabilities go up. But its assets also have to go up in order to maintain the debt-equity ratio. So in that way, you know, the analysis that I performed takes into account company growth.

Q. I'm just focusing on the part of your analysis that analyzes whether or not Roxane encroached upon its initial paid-in capital and it's additional capital surplus.

A. Right.

Q. If you look at the statement of financial positions that are reflected in both

Exhibit 15 and Exhibit 18. You could take a minute to find those.

A. Okay. Sure.

MS. RIVERA: Is it on the statement of income or...

A. Looks like the statement of financial position.

Q. Yes.

Do you observe that Roxane's capital stock and additional paid-in capital stayed the same from 1995 as they were in 2000?

A. Unless -- just as a matter of what capital stock and initial paid-in capital are -- unless -- that one would expect those numbers to stay the same, generally speaking. That is to say, that the notion, the theory behind capital stock or initial capital, additional paid-in capital or capital surplus is this is the amount of the firm's initial capitalization and it should be sort of kept -- you know, and that amount should not be encroached upon. There is no theory or practice, certainly, that suggests in any way,

shape, or form that as a company grows its capital stock or additional paid-in capital should increase.

Q. Understood.

Is the fact that a corporation does not encroach upon its capital stock and additional paid-in capital decrease in usefulness as the company grows in size?

A. No, not at all. Because you could imagine a company that grows in size but its liabilities are growing faster than its assets and, therefore, it encroaches on its capital stock or additional paid-in capital.

So what matters really is what these numbers tell you holding them constant is notwithstanding the fact that the company is growing, the liabilities are growing sufficiently in size along -- sorry, the assets are growing sufficiently in size along with the liabilities such that you don't encroach on the capital stock or paid-in capital.

Q. Is it fair to say that the analysis

focuses on -- focuses more on the liabilities and assets, the entire balance sheet as a company grows as opposed to just whether or not the initial paid-in capital and additional paid-in capital is encroached upon?

A. Certainly one would look at both of those things. You wouldn't want to look at only one or the other, but yes, I agree with you that the analysis encompasses both, yes.

Q. Let's just introduce one other article you wrote. You can clarify what you mean.

(Whereupon, Article written by Professor Macey entitled "Creditors Versus Capital Formation: The Case Against the European Legal Capital Rules", was marked as Exhibit Macey 019 for identification, as of this date.)

Q. Exhibit 19 is an article you wrote called Creditors Versus Capital Formation: The Case Against the European Legal Capital Rules. It is dated September 2001 and it was published in the Cornell Law Review.

Again, feel free to familiarize yourself

with it, but I can tell you I'll be asking you questions about the first paragraph on page 12 --

A. Okay.

Q. -- starting with the "primary reason?

A. Yes, I see it.

Q. I'm looking at the second sentence that you write:

"Because a firm may immediately begin to incur losses, either merely in the normal course of business or by entering into one of the many kinds of unfair transactions that Article 11 of the second directive does not cover, the initial paid-in capital is a meaningless amount. In other words, creditors willing to inform themselves about a firm's existing equity cushion must examine its entire balance sheet."

Do you see that?

A. Yes.

Q. Can you clarify what you mean by the initial paid-in capital is a meaningless amount?

A. The idea is that if you start -- let's imagine we start a firm with a hundred dollars in

356

testimony?
A. Yes.
Q. Could you tell us what was discussed about the complaint?
A. To the best of my recollection, I think the discussions went something along these lines: That as is consistent with my practice is, you know, my ordinary kind of practice I -- the document that I look at first in a matter is the complaint. So I asked people -- someone at the Kirkland firm if the complaint would be available and they made the complaint available to me and I read it. And in the course of reading it, I was - - let me see how to put this. You know, my attention was drawn to a couple of paragraphs in the report, so that's essentially what happened.
Q. Do you recall what paragraph that you referred to?
A. I believe I refer to this in my report, so let me -- if you'll give me just a second, I think I can respond to that. I remember -- I'm sorry, okay, if you look at paragraph 38 of my

357

report in footnote seven it refers to the complaint at paragraph 19.
Q. Right. Okay.
A. So that would have been -- I don't have the complaint with me, I'm sorry to say, but -- so it would be that and maybe, you know, paragraphs - - those weren't the only parts of the complaint that I looked at. I read the whole thing, but that I think I remember as being something that I noticed in the complaint as being something that was interest to me in light of my areas of research and focus.
Q. Did you discuss paragraph 19 of the complaint with Roxane's attorneys?
A. Not -- not in any way that I recall.
Q. Can you tell us what, from your experience -- what parts of your experience have informed your opinion in this case?
A. Well, so with respect to my general experience, I was involved in financial modeling as an investment banker when I graduated from college. So I'm used to thinking about cash flows

358

and the way that cash flows are used to pay debts of company and the concepts -- the basic financial, you know -- basic finance concepts.
And then in my teaching career I teach finance, and I teach corporate governance, and I teach relationships among firms. I also have done -- served on boards of directors and on various committees of boards of directors that have subsidiary corporations that are parent corporations. So I've observed firsthand the relationships between parent companies and subsidiaries and subsidiaries and affiliates. And these are areas that I've -- in which -- that I've taught in and that I've done research in.
So the various topics relating to corporate governance practice, ordinary behavior among corporate members of corporate groups, you know, shared services transactions, shared cash management systems, all of these are sort of touchstones in things that I actively am involved in in terms of teaching and in terms of serving as a director.

359

Q. Which companies that you served as a director on had a shared services system?
A. I'm currently on the board of WCI Communities where there is -- you know, there are shared services in that company.
Q. Is there a separate subsidiary that provides the services in that company similar to the BISC for the Roxane Boehringer company?
A. No.
Q. So in that company the services are all provided by one subsidiary to the other affiliate?
A. That's my recollection, yes.
Q. Are you aware of companies where there is a shared services subsidiary and then other types of shared services are provided by a different affiliate as we have in the Boehringer company?
A. Yes. In the case we have there is -- as you point out, there are basically two types of shared services. There is what I would call ministerial shared services, which are the shared services that are conducted in the kind of

360

dedicated subsidiary. And then there are shared services that are conducted -- that are -- I would describe as being more complicated than mere administrative or ministerial, which were conducted in BIPI.

And while no particular companies come to mind at the moment, that -- this is something that I've seen discussed as a common business arrangement. It basically has to do with the natural evolution of firms over time that a company may have a particular function like law, as I talked about yesterday. And they won't move that shared services out of a particular subsidiary like BIPI and put it in a dedicated shared services company, but they might have a shared services company that does other things.

So the allocation of shared services in this case between BIPI -- with BIPI doing some of it for Roxane and other entities, and the BISC doing others of it struck me as having a rational basis in logic and being consistent with standard practice amongst corporations and subsidiaries.

361

Q. Are you familiar with the concept of a shared services agreement?

A. Yes.

Q. Did you see any evidence that there was that type of agreement in the Boehringer company?

A. I saw evidence that the shared services were billed and that the subsidiaries were compensated -- or were required to pay for the services that they were provided.

So there was -- I took that as evidence that there was an agreement in place. I did not see a formal agreement or at least not that I can recall sitting here right now.

Q. You discussed yesterday officers of BIC and BIPI wearing various hats. Do you remember that discussion?

A. Yes, I do.

Q. Would it be usual in that type of situation for the officers' salary to be allocated to the various subsidiaries and affiliates of a holding company?

A. No.

362

Q. That's not done?

A. Well, I don't know that it's never done, but it would be unusual. That is, on the companies I'm involved with and other companies that I'm familiar with certainly we have top officers, they're going to receive one paycheck and they will not -- and their salaries won't be - - will not be billed back, generally speaking.

Q. And again, that's based on that WCI Communities?

A. Well, it's based on not just that one example, but generally speaking that's my understanding of the way work is allocated in -- among top officers, that you don't have this sort of billing back where people play multiple roles within a firm.

And the reason for that is that the companies really don't want people to say, well, I'm 4 percent with Roxane and 96 percent with or 92 percent with BIPI and 2 percent with BIC. They want people to make their own judgments about -- you know, at various particular time what's the

363

appropriate allocation of their effort.

Q. Well, how is it determined how to allocate the salaries of managers and employees, then, to the various affiliates where those folks are wearing different hats?

A. Well, it's very difficult, which is why in this case typical with what I observed generally speaking, you don't observe that -- you don't see this sort of allocation.

So it's my recollection, for example, that when employees went to -- when there were Roxane employees that went to Ben Venue, like Judy Waterer, all of her salary was allocated back to Roxane. So there are a number of complicated factors that make it really difficult. You know, if you have -- so it would make it very difficult to do -- to have any alternative procedure because these companies -- you'd have to somehow give a person a percentage of their salary from company one, a percentage of their salary from company two, then some kind of a tax reporting for these two. You'd have different pension plans.